Filed 10/2/02 In re Cesar P. CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re CESAR P., a Person Coming Under The Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. CESAR P., Defendant and Appellant.	F039430 (Super. Ct. No. 503836) **O P I N I O N**

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. Maria Sovey Silveira, Judge.

Tim Warriner, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Robert P. Whitlock and William K. Kim, Attorneys General, for Plaintiff and Respondent.

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* Before Harris, Acting P.J., Cornell, J., and Gomes, J.

The court readjudged appellant, Cesar P., a ward of the court after it sustained allegations in a petition charging him with conspiracy to commit assault (Pen. Code, §§ 182/245) and conspiracy to commit attempted arson (Pen. Code, §§ 182, 455). On October 4, 2001, the court placed Cesar on formal probation. On appeal, Cesar contends the court erred when it: 1) sustained the allegations charging him with conspiracy to commit attempted arson; 2) set a maximum term of confinement; and 3) aggregated the time for a prior sustained petitions. Cesar further contends the court did not understand it had discretion to impose concurrent time. We will find merit in Cesar's first contention and that his last two contentions are moot. In all other respects, we will affirm the judgment.

FACTS

On August 20, 2001, at approximately 12:45 a.m., 13-year-old Cesar accompanied three men who assaulted David M. At approximately 1:00 a.m., Cesar drove the three men to a location where one man got out and threw a molotov cocktail at an occupied house. Although a wall of the house caught fire, a resident was able to extinguish it before it burned through.

DISCUSSION

The Conspiracy To Commit Attempted Arson Offense

Cesar contends the court erred in sustaining the allegations charging him with conspiracy to commit attempted arson because it is a nonexistent crime. Respondent concedes and we agree.

In *People v. Iniguez* (2002) 96 Cal.App.4th 75, the defendant pled guilty to conspiracy to commit attempted murder. However, in reversing the defendant's conviction the *Iniguez* court explained:

> "[We reverse] because the targeted crime of the conspiracy, attempted murder, requires a specific intent to actually commit the murder, while the agreement underlying the conspiracy pleaded to contemplated no more than an ineffectual act. No one can simultaneously intend to do and

not do the same act, here the actual commission of a murder. This inconsistency in required mental states makes the purported conspiracy to commit attempted murder a legal falsehood." (*Id*. at p. 77.)

The *Iniguez* court's reasoning applies equally to other offenses charged as a conspiracy to attempt to commit a particular offense. Accordingly, we find the offense of conspiracy to commit attempted arson is a nonexistant offense and that the juvenile court erred when it sustained allegations charging Cesar with this offense.

The Maximum Term Of Confinement Issue

Welfare and Institutions Code section 726, in pertinent part, provides:

> "In any case in which the minor is removed from the physical custody of his or her parent or guardian as the result of an order of wardship made pursuant to Section 602, the order shall specify that the minor may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court."

During Cesar's disposition hearing the prosecutor raised the issue of Cesar maximum term of confinement in the following colloquy:

> "[PROSECUTOR]: Your Honor, the maximum confinement time?
>
> "THE COURT: I'm not sure.
>
> "[PROSECUTOR]: Your Honor, we'll calculate it right now. Probation is going to calculate it.
>
> "PROBATION OFFICER: Thank you. Make it out to be 48 months.
>
> "THE COURT: So that is 48 months, the time for the first amended petition and the previous one is – was on under the 654.
>
> "That's Cesar, what you need to understand, the maximum confinement time because of these offenses, both from [the] previous [petition] when you were on informal probation and the two things I found to be true, is 48 months. That means you could go and be in a locked setting for four years right now, based on what is already in your file.

"Do you understand that?

"THE JUVENILE: Yes."

Cesar contends the court is required to set his maximum term of confinement only when it removes custody of a ward from the parents. Thus, according to Cesar, the court erred when it set a maximum term of confinement because it did not remove his physical custody from is parents. Respondent contends the above colloquy shows the court merely advised Cesar what his maximum term of confinement would be if he had been ordered into commitment. We agree with respondent that the court did not purport to set Cesar's maximum term of confinement through the above quoted comments. Instead, we interpret the court's comments simply as an explanation that based on the instant offense and the offense from a prior petition, Cesar faced a maximum term of confinement of four years. Additionally, we further find the clerk's minutes erroneously indicate that the court set Cesar's maximum term of confinement at 48 months and we will order the juvenile court to correct this error.

Cesar's Remaining Contentions

In view of our finding that the court did not set Cesar's maximum term of confinement, we find his remaining contentions are moot.

DISPOSITION

The judgment is modified to strike the maximum term of confinement of 48 months contained in the clerk's minutes. Additionally, the conspiracy to commit attempted arson charge is dismissed. As modified, the judgment is affirmed.